RECENT DECISIONS.

ADMIRALTY—JURISDICTION OVER TORTS. The plaintiff, an employee of the defendant, a contracting stevedore, was injured while in the hold of a vessel by the defendant's negligence. *Held*, as the tort was not of a marine nature nor the suit against the vessel or its master, the court of admiralty had no jurisdiction. *Campbell* v. *Hackfeld & Co.* (C. C. A., 9th Cir., 1903) 125 Fed. 696.

Prior to the decision of the above case in the court below the test of admiralty jurisdiction over torts had been assumed to be the locality of the act. *The Plymouth* (1865) 3 Wall. 20; Hughes on Admiralty, § 96, et seq. The view here taken limits the jurisdiction to torts of a marine nature, thus adopting the jurisdictional test applied to contracts in the admiralty courts. *Insurance Co.* v. *Dunham* (1870) 11 Wall. 1. There seems to be no reason for this limitation in the case of torts as the locality test has proved satisfactory and the new rule will only tend to unsettle the law by making it necessary in each case to determine whether or not a marine relation exists.

AGENCY—ATTORNEY AND CLIENT—CHAMPERTY. The plaintiff entered into a contract with the defendants by which the latter were to prosecute a suit for a percentage of the proceeds. *Held*, such contract was void for champerty. *Gargano* v. *Pope* (Mass. 1904) 69 N. E. 343.

Massachusetts follows the old rule as laid down in 1 Hawkins Pl. Crown, c. 84, § 1, that "champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it." *Thurston* v. *Percival* (Mass. 1823) 1 Pick. 415; *Akhert* v. *Barker* (1881) 131 Mass. 436; *Hadlock* v. *Brooks* (1901) 178 Mass. 425, 59 N. E. 1009. In Massachusetts a fee is not champertous if it is to constitute a debt between the parties, even though the proceeds of the suit are to be considered security, but the fee is champertous if the attorney's sole compensation is to be a share of the proceeds of the litigation. *Hadlock* v. *Brooks*, supra. There seems to be no logical reason for this distinction. It is hard to see how taking a fee out of the proceeds stirs up litigation more than if the same fee were to create a debt between the parties—the proceeds to be held as security.

AGENCY—ATTORNEY AND CLIENT—SCOPE OF ATTORNEY'S AUTHORITY. The defendant's attorney by mistake pleaded matter which would operate as a general appearance, though directed to appear specially only. *Held*, the defendant was bound by the act of the attorney. *McNeal* v. *Gossaud* (Kan. 1903) 74 Pac. 628.

In an amended complaint certain allegations were omitted which had been put in the original complaint. *Held*, while the original allegations were presumptively admissions of the plaintiff as having been made by his attorney and agent, he could offset their force by showing that they were not made by his authority. *Gallaway* v. *San Antonio & G. R. Co.* (Tex. 1903) 78 S. W. 32.

There seems to be no doubt, as a matter of decision, that the act of the attorney in the first case, in putting in a general appearance, even though in excess of his specific instructions, should bind his principal. *Kramer* v. *Gerlach* (N. Y. Sup. Ct. 1899) 28 Misc. 525; *Harshey* v. *Blackmarr* (1866) 20 Iowa 161. 186–7. The view of the courts is that the apparent authority of the attorney in all matters of procedure, is a general one, and cannot be limited by secret instructions. Mechem, Agency, § 279. The distinction between the first and second cases lies in the fact that the courts do not recognize any implied authority in the attorney to make statements as to the substantive facts of his client's cause of action in pleadings, which "are framed rather to put an issue

into shape than to exhibit the client's actual standpoint as to the particular facts." Wharton, Evidence § 838. While presumptively there is an actual authority to make such statements, *Lindner* v. *Ins. Co.* (1896) 93 Wis. 526, there is no objection to allowing the client, as in the second case, to rebut the presumption.

CONSTITUTIONAL LAW—JURISDICTION OF FEDERAL COURTS AS TO DETERMINATION OF CITIZENSHIP. A Chinese person seeking to enter the country under a claim of citizenship was excluded by an executive officer, under the authority of Congress, on the ground that his claim was unfounded. He appealed to the courts. *Held*, Congress has, under the Chinese Exclusion Acts, conferred upon executive officers exclusive jurisdiction to determine the facts upon which a claim of citizenship is based, and in so doing acted constitutionally. In re *Sing Tuck* (1903) 126 Fed. 386. See NOTES, p. 290.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL OF RIGHT TO CONTRACT. A statute provided that all city employes should receive not less than the prevailing rate of wages. The plaintiff had been employed at, and had accepted, less than that rate and, after several years, sued for the difference between the amount due under the statute and what he had received. *Held*, the statute was constitutional, but the plaintiff under the circumstances had waived any rights thereunder. *Ryan* v. *New York* (1904) 177 N. Y. 271. See NOTES, p. 289.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF HOURS OF LABOR IN BAKERIES. New York Laws 1897, ch. 415, art. 8, § 110, provided for maximum hours of labor in bakeries. *Held*, a valid exercise of the police power. *People* v. *Lochner* (1904) 177 N. Y. 145.

The case, though new on its precise facts, would seem to be logically within the principle of *Holden* v. *Hardy* (1897) 169 U. S. 366, upholding a statute providing for an eight-hour day in mines and smelters, and the statute is certainly as obvious an exercise of the legislative discretion in protecting public health as one closing barber-shops on Sunday, except in certain communities, which was sustained in *People* v. *Havnor* (1896) 149 N. Y. 195. The grounds of the decision as given in the three prevailing opinions are perhaps the most noteworthy feature of the present case. PARKER, C. J., and GRAY, J., proceed upon the assumption that as the statute appears from its context and upon its face to have been passed with a view to the public health, it is not for the court to interfere with the legislative discretion. VANN, J., concurs only after a laborious investigation of the probability that the welfare of laborers and of the public would actually be promoted thereby.

CONSTITUTIONAL LAW—POLICE POWER—HEALTH REGULATIONS. A statute required tenement house owners to substitute a different sewerage system for that in use. The defense to an action thereunder was that the cost of changing the plumbing would equal the defendant's equity in the property. *Held*, the act was a proper exercise of the police power and individual hardship was not the criterion of constitutionalty. *Ten. House Com.* v. *Moeschen* (N. Y. Sup. Ct. 1904) 89 App. Div. 526.

Such regulations clearly fall within the scope of the police power of the state. Black, Interpretation of Laws, 304. Similar statutes have been upheld as constitutional in several jurisdictions, including New York. *Com.* v. *Roberts* (1892) 155 Mass. 281; *Harrington* v. *Board, etc.* (1897) 20 R. I. 233; *Health Dept.* v. *Rector, etc.* (1895) 145 N. Y. 32. The plea of hardship, though apparently novel under the present circumstances, was properly overruled. It is apparent that the validity of a police regulation must be determined from the face of the statute, not by the situation of the particular defendant.

CONSTITUTIONAL LAW—STATE INTERFERENCE WITH INTER-STATE COMMERCE.—TAX UPON RAILROAD CAB SERVICE. The relator had established a cab service for the sole purpose of enabling its patrons to get to and

from its ferry landing in New York City in order to take, and after having taken, passage across the state line. The cab service and the transportation across the state line were separately contracted and paid for. *Held*, a tax on the cab service was not a regulation of inter-state commerce. *New York* ex rel. *Pennsylvania R. Co.* v. *Knight* (1904) 192 U. S. 21. See NOTES, p. 296.

CONSTITUTIONAL LAW—STATUS OF PORTO RICAN. The petitioner was refused admission into the United States on the ground that she was an indigent alien, under 26 U. S. Stat. 1084, c. 551. Being a Porto Rican she claimed she was not an alien within the meaning of the statute, and the court so held. *Gonzales* v. *Williams* (1904) 192 U. S. 1.

The decision is in line with *De Lima* v. *Bidwell* (1901) 182 U. S. 1, which held that Porto Rico was not a "foreign county" within the meaning of the tariff laws, and *Huus* v. *Steamship Co.* (1901) 182 U. S. 392, which held that vessels plying between New York and Porto Rico were engaged in the "coasting trade" within the meaning of U. S. Revised Stat. § 4444, exempting such vessels from certain pilot charges. It is still an open question under the decision in the principal case, whether or not Porto Ricans are citizens of the United States. Alienage was the sole question before the court, not citizenship. See NOTES, p. 290.

CONTRACTS—ACCEPTANCE OF OFFER BY TELEPHONE. Under the Constitution of California providing that a contractual action could be brought either where the contract was made or where it was to be performed, *held*, where an offer and acceptance were made by telephone, the contract was made in the county of the acceptor, but the agreement being performable in the county of the offeror, an action there was maintainable. *Bank of Yalo* v. *Sperry Flour Co.* (Cal. 1903) 74 Pac. 855.

The prevailing rule with regard to acceptance by mail or telegraph, in England and the United States, is that a contract is concluded upon the mailing of the letter or filing of the telegram containing the acceptance. *Moon* v. *Pierson* (1858) 6 Ia. 279; *Trevor* v. *Wood* (1867) 36 N. Y. 307. The holding in Massachusetts that the acceptance of an offer for a bilateral contract must be communicated is the sounder view on principle, because the promise of the acceptor which forms the consideration for that of the offeror is no promise without a promisee. *McCulloch* v. *Ins. Co.* (1822) 1 Pick. 278; Langdell on Contracts, §§ 14, 15. This is also the view adopted in France. *S.* v. *F.* (1813) Merlin, Reportoire de Jurisprudence, Tit. Vente, 1, Art. III, No. XI, bis; s. c. 1 Keener's Cases on Contracts, 149. The principal case, however, following the analogy of the mail and telegraph cases, applies the prevailing rule to those involving the use of the telephone. This is believed to be the first case in which the application has been made. See 2 COLUMBIA LAW REVIEW, 1.

CONTRACTS—BENEFICIARIES—ESTOPPEL OF RE-INSURER IN ACTION BY POLICY-HOLDER. A contract of reinsurance provided that the reinsurer should assume the risks of the insurer but that the contract should be void unless certain payments were made. A notice of the contract sent to policy-holders by the reinsurer contained no mention of the condition of payment. *Held*, in an action by a policy-holder the reinsurer was estopped to set up a breach of the condition. *Ruohs* v. *Ins. Co.* (Tenn. 1903) 78 S. W. 85.

In jurisdictions allowing the beneficiary of a contract to sue thereon, the policy-holder may recover where the contract of reinsurance includes an assumption of liability on the original policies. *Glen* v. *Hope Ins. Co.* (1874) 56 N. Y. 379; *Whitney* v. *Ins. Co.* (1900) 127 Cal. 464. In beneficial contracts generally, after the right of the beneficiary has attached, it cannot be defeated by subsequent acts of the immediate parties. *Bay* v. *Williams* (1884) 112 Ill. 91; *Gifford* v. *Corrigan* (1889) 117 N. Y. 257. The principal case goes a step further, holding that the promisor may so conduct himself that he will be estopped to set up even the terms of the original contract, as against the beneficiary.

CONTRACTS—CONSIDERATION—COMPROMISE OF DOUBTFUL CLAIM. The plaintiff recovered a judgment against W who before such judgment was entered conveyed certain real estate to the defendant. The plaintiff believing the judgment a lien on the real estate agreed to assign the judgment to the defendant, the latter promising to pay the amount. *Held*, the agreement was not based on any consideration of value, the plaintiff's judgment not having been a lien there was no obligation on the part of the defendants. *Bell* v. *Pfadenhauer* (N. Y. 1903) 85 N. Y. Supp. 869.

As the case is reported it is insupportable. Since the consideration for the defendant's promise was the assignment of a judgment it is difficult to see how the non-existence of a lien was material. If the conclusion was reached by construing the contract as one for the release of the lien and on the theory that the plaintiff could have had no reasonable doubt as to the invalidity of such lien, the court erred in not submitting that question to the jury. The decision can possibly be supported on the ground that what the court did find was that the facts failed to support the cause of action alleged in the complaint, but this is a bare assumption. Inasmuch as the defendant on receiving the real estate from the judgment debtor had "agreed to pay the debts" of the latter, the plaintiff irrespective of any contract with the defendant might have recovered under *Lawrence* v. *Fox* (1859) 20 N. Y. 268.

CORPORATIONS—EXEMPLARY DAMAGES FOR FRAUD OF AGENT. The agent of the defendant-corporation induced the plaintiff to pay the claim of its debtor by representing that the debtor was solvent, and that a mortgage transferred to the plaintiff was ample security. As a matter of fact the debtor was insolvent and the mortgage was worthless. Both these facts seem to have been known by the agent. *Held*, the evidence shows a case for exemplary damages, which can be maintained against the corporation since the act of the agent is its act. *Western Cottage Piano and Organ Co.* v. *Anderson* (Tex. 1903) 76 S. W. 945.

Exemplary damages, when allowed, are given as a punishment for the wilful or wanton act of the defendant. Hale on Damages, p. 209. It is usually held that a principal is not liable in exemplary damages for such acts of his agent unless he authorized or ratified them, or was in some way sufficiently negligent to attract to himself liability. *Eriston* v. *Cramer* (1883) 57 Wis. 570; *Sawyer* v. *Sauer* (1872) 10 Kan. 466. There is a difference of opinion as to the liability of corporations for the willful or wanton acts of their agents or servants. Some hold them responsible for exemplary damages in all cases where the agent would be, *Phil. Traction Co.* v. *Orbann* (Pa. 1888) 12 Atl. 816, while others apply the rule above announced as to the liability of individual principals under similar circumstances. *I. C. R. R. Co.* v. *Hammer* (1874) 72 Ill. 347, 353. The courts of the state where the principal case arose seem to have been committed to the latter view; *Hays* v. *Railroad Co.* (1876) 46 Tex. 272; *I. & G. N. R. Co.* v. *Garcia* (1888) 70 Tex. 207, unless, indeed, a distinction may be taken because of the difference of the character of the agent acting. See Sedgwick on Damages §§ 379–380.

CORPORATIONS—TORTS—CONTINUING LIABILITY OF PUBLIC SERVANT LEASING FRANCHISE. During the operation of a railroad by the lessee of the defendant corporation which had been granted the original franchise, the plaintiff's child was killed, *Held*, the defendant was primarily under obligation to the public and was therefore liable. *Muntz* v. *A. & G. St. R. Co.* (La. 1904) 35 So. 624.

Since the privileges granted by the franchise are to be exercised for the public good, a transfer, whereby the corporation is disabled from performing such functions, is deemed void without legislative license. *Thomas* v. *Railroad Co.* (1879) 101 U. S. 71. Without such authority the original corporation remains primarily liable, and as to the public, those operating the road are to be regarded as agents of such original corporation, *Abbott* v. *Johnstown* R. Co. (1880) 80 N. Y. 27, although the lessee is of course also liable. *Pennsylvania Co.* v. *Sloan* (1888) 125 Ill. 72.

On principle this rule would seem to apply generally to public service corporations. It applies most strictly, however, to railroads. Though formerly held applicable to gas and water companies, *Chi. Gas Co.* v. *People's Co.* (1887) 121 Ills. 530, there is now a tendency to relax the rule on considerations of policy. 2 COLUMBIA LAW REVIEW, 418.

EQUITY—PRIORITIES IN PARTIAL ASSIGNMENTS AS AFFECTED BY NOTICE. A contractor gave orders on a fund, due or to become due under his contract, to successive assignees. All the assignees claimed together. *Held*, the right of priority as between them depends upon the date of notice given to the debtor and not upon the date of giving the orders, such notice being essential to perfect the assignment. *Third National Bank* v. *Atlantic City* (C. C., D. N. J., 1903) 126 Fed. 413.

The court, without any discussion of the merits of the question, considered itself bound by *Judson* v. *Corcoran* (1854) 17 How. 612 and *Spain* v. *Hamiltons Admin's* (1863) 1 Wall. 604. As was pointed out in 3 COLUMBIA LAW REVIEW 581, the function of notice is merely to protect the assignee from collusion between the debtor and his assignor, and is consequently in no way essential to perfect the assignment itself. The assignees should, therefore, have been given priority according to the date of their orders, since all claimed together before any particular claim had been reduced to possession.

EQUITY—SPECIFIC PERFORMANCE OF ORAL CONTRACT. The plaintiff for a number of years performed various personal services for the testator who in return promised to leave to her by his will, a certain house and lot. The plaintiff and the testator occupied the house together. *Held*, the contract would be specifically performed. *Winfield* v. *Bowen* (N. J. 1903) 56 Atl. 728. See NOTES, p. 294.

EVIDENCE—PROOF OF GOOD CHARACTER IN CRIMINAL CASES. On a trial for larceny the defendant offered evidence of his good character. *Held*, such evidence should be considered by the jury without reference to the apparently conclusive or inconclusive character of the other evidence. *State* v. *Birkby* (Iowa 1904) 97 N. W. 980.

Evidence of the defendant's good character is admissible in all criminal actions, regardless of the grade of the offense charged. *Cancemi* v. *People* (1858) 16 N. Y. 501. The weight of such evidence varies with the circumstances of each case. If the evidence of guilt is clear and convincing, proof of good character will not avail the defendant. But if the evidence offered to convict is entirely circumstantial, or supplied by but one witness, evidence of the defendant's good character, by raising a presumption that one of such character would be unlikely to commit crime, may be of great weight. A few early cases hold that good character is to be considered in doubtful cases only, 1 Starkie, Evidence, 10th ed., 75, but the modern rule is as expressed in the principal case—that good character is a fact to be considered by the jury, in connection with all the other facts in the case, and that the jury is to determine its weight in all cases. *People* v. *Garbutt* (1868) 17 Mich. 9; *Remsen* v. *People* (1870) 43 N. Y. 6.

MUNICIPAL CORPORATIONS—LIABILITY FOR SUSPENSION OF ORDINANCE FORBIDDING FIREWORKS. The plaintiff sued for the death of his intestate resulting from an explosion of fireworks on the ground that the explosion was the consequence of a public nuisance which the defendant city had licensed. During a political campaign the Board of Aldermen had, by a resolution, suspended, subject to the regulation of the police department, an ordinance forbidding fireworks displays. *Held*, this operated as a repeal of the statute, and not as a license by the city to those who wished to use fireworks, and the city was, therefore, entitled to judgment. *Landau* v. *City of New York* (N. Y. 1904) 90 App. Div. 50.

It is well settled that a city is not liable for failure to pass an ordinance, Elliott, Municipal Corporations, § 307, and it follows that it cannot be held for repealing an ordinance after it is passed. The resolution in the principal case must be regarded as a repeal pro tanto—a suspension for a

time of the operation of the act. *Hill* v. *Aldermen* (1875) 72 N. C. 55. *Speir* v. *City of Brooklyn* (1898) 139 N. Y. 6 is distinguishable on the ground that the ordinance in that case provided for the issuing of a license by the mayor; the court held, therefore, that the city had authorized the act licensed. See *Cohen* v. *Mayor* (1889) 113 N. Y. 532.

PERSONAL PROPERTY—TREASURE TROVE. The plaintiffs were employed by the defendants to clean out an old henhouse and in the course of the work unearthed $7,000 in gold. *Held*, the plaintiffs were entitled to the possession as against the defendants on the theory that the finder of lost goods may hold them against every one but the true owner. *Danielson* v. *Roberts* (Or. 1903) 74 Pac. 913. See NOTES, p. 293.

PLEADING AND PRACTICE—FORM OF COMPLAINT IN LIBEL ACTION UNDER NEW YORK CODE. The plaintiff's name and age, as stated in her complaint, did not correspond with those given in an alleged libel therein set forth. Without averring other facts connecting her with the statements complained of, she then alleged generally that they were published "of and concerning the plaintiff." *Held*, the complaint was demurrable. *Corr* v. *Sun Print. & Pub. Ass'n* (1904) 177 N. Y. 131.

The technical inducement and colloquium of the complaint in slander and libel actions at common law—see *Miller* v. *Maxwell* (1836) 16 Wend. 9; *Tyler* v. *Tillotson* (1842) 2 Hill 507—are done away with under the reformed procedure, which allows an inferential application of the libellous matter to the plaintiff. N. Y. Code Civ. Proc. § 535; Townshend, Slander and Libel, 4th ed., § 316; *Crandall* v. *Jacobs* (N. Y. 1897) 22 App. Div. 400, 403. But where, as in the principal case, the facts, notwithstanding the general allegation, tend to show that some other person than the plaintiff is referred to, as the conclusion drawn is inconsistent, the complaint is demurrable. *Fleischmann* v. *Bennett* (1881) 87 N. Y. 231.

PLEADING AND PRACTICE—LIMITATION OF ACTION FOR DOWER UNDER NEW YORK CODE. The plaintiff, a widow, claimed dower forty years after her husband's death. The New York Code of Civil Procedure, § 1596, provides a twenty-year limitation, with exceptions in case of certain disabilities of the widow. The plaintiff relies on the defendant's absence from the state, as provided in § 401. *Held*, § 1596 is exclusive and the general provisions, §§ 398–415, do not apply, hence the claim was barred. *Wetyen* v. *Fick* (N. Y. 1904) 90 App. Div. 43.

The right to dower existed before any statute of limitations applied to it, so that *Hill* v. *Supervisors* (1890) 119 N. Y. 344, assuming that case still to be law, would not justify the decision. The present case seems indistinguishable on principle from *Titus* v. *Poole* (1895) 145 N. Y. 414 and *Hayden* v. *Pierce* (1895) 144 N. Y. 512. In attempting a distinction, the court says the mention of certain disabilities in § 1596 implies the exclusion of other exceptions to the running of the statute. But the language used in § 1596 is a repetition, with such changes as the difference in the nature of the actions demand, of §§ 365 and 375 when read together and of §§ 380–385 and 396 when so read. That part of § 1596 relating to disabilities is identical, word for word, with corresponding parts of §§ 375 and 396. The fact that there was in the early authorities a conflict as to whether a statute of limitations would without special mention apply to actions for dower, *Parker* v. *Obear* (Mass. 1843) 7 Met. 24; 2 Scribner on Dower (2nd ed.) 559–580, may explain why a period of limitation with specified disabilities was specially inserted in the provisions relating to actions for dower. See 4 COLUMBIA LAW REVIEW, 143.

PLEADING AND PRACTICE—SERVICE OF PROCESS—NONRESIDENCE. The defendant, a resident of Nebraska, brought into Iowa by extradition proceedings, was acquitted, but before being able to leave the state was served with civil process. The plaintiff was not concerned in the defendant's extradition. *Held*, until a reasonable time had been given him to leave the state the defendant was privileged from service. *Murray* v. *Wilcox* (Iowa 1903) 97 N. W. 1087.

The unhampered administration of justice demands that parties and witnesses in a civil action be assured of immunity from service of process. The court rests the present decision upon the same grounds. Clearly this reasoning does not apply where the appearance of the defendant has been compelled by force. The privilege is generally recognized but the more familiar and better ground is that good faith and interstate comity demand that the defendant lose only such rights as he has forfeited by the commission of the alleged crime; and that the extradition process be confined to the single use for which it was provided by the Federal Constitution. *Compton* v. *Wilder* (1883) 40 O. St. 130; *Moletor* v. *Sinnen* (1890) 76 Wis. 308. A different rule prevails in New York where the defendant is privileged only as against a person who was instrumental in procuring his extradition and that wrongfully. *Adriance* v. *Lagrave* (1875) 59 N. Y. 110; *Martin* v. *Woodhall* (1889) 21 N. Y. S. Rep. 465.

REAL PROPERTY—DOWER—POSSESSION BY WIDOW AS TRUSTEE—STATUTE OF LIMITATIONS. The testator devised all his property to his widow in trust to apply the rents and profits to the use of the heirs until they became of age, and then to convey to them. The widow carried out the provisions of the will for a longer period than that of limitation for dower. *Held*, on suit by the heirs for partition, the widow's dower was not barred. *Sperry* v. *Swiger* (W. Va. 1903) 46 S. E. 125.

Since the law knows nothing of the relation of trustee and cestui, there could be no adverse possession of the widow against herself. The court also holds that the payment of rents and profits did not bar the widow from later setting up her claim for dower. As the testator purported to convey his entire property in derogation of the widow's right of dower, the widow's payment of rents and profits might be open to the construction of an acknowledgment of a trust of the entire property. 2 Scribner on Dower (2nd ed.) 259-261. But as the testator's disposition so far as it was in conflict with the dower right was liable to be defeated by the widow's interposition, the widow's acts may also be construed as a voluntary payment of her own property.

REAL PROPERTY—EXCEPTION IN DEED—CONSTRUCTION. C conveyed land to P excepting the fee of whichever of several strata of coal thereon he, his heirs, or assigns might thereafter elect. The heirs of C brought ejectment to oust the grantee of P, from one of the strata. *Held*, POFFENBARGER, J., dissenting, the exception was void for indefiniteness. *Chapman* v. *Mill Creek Co.* (W. Va. 1903) 46 S. E. 262.

It was not denied that the grantor might have reserved the fee in any stratum or in all the coal on the land. *Lillibridge* v. *Coal Co.* (1890) 143 Pa. St. 293. An exception of a number of acres from a grant of a larger number makes the grantor and grantee tenants in common in proportion as their interests appear. Washburn, Real Prop. § 878; Freeman, Cotenancy, 2d ed. § 96. An election of the grantor operates as a partition and vests in him exclusive title to the part chosen. *Benn* v. *Hatcher* (1886) 81 Va. 25; *Brown* v. *Bailey* (Mass. 1840) 1 Met. 254. It is impossible to distinguish this case. The grantor was a tenant in common with the grantee of all the coal with an interest of one sixth. If it be objected that there is a break in the analogy inasmuch as in the cases cited the extent of the grantor's interest is certain, it is only so for the purpose of compelling a partition; for which purpose it is equally so in this case. Here the court may compel a partition by assigning him one of six strata; in the cases cited by assigning the specific number of acres. At no time is the extent of his interest certain for any other purpose for he may elect to take one stratum or certain acres equal in value to the entire remainder.

REAL PROPERTY—GRANT OF EASEMENT—NOTICE. The plaintiff, a tenant under two successive leases, sued for infringement of his easements of light, air and access. Prior to the execution of the second lease, the lessor had released the easements to the defendant, but the deed was not

recorded. *Held*, the continuation of the defendant in open and notorious possession of the easements was notice of the grant to the defendant and the plaintiff could not recover for damages during the second term. *Child* v. *N. Y. Elevated R. Co.* (N. Y. 1904) 89 App. Div. 598.

Possession is notice to a stranger of whatever rights the possessor may have. *Georgia B. & S. Ass'n* v. *Faison* (1901) 114 Ga. 655; Wade on Notice, § 273. This doctrine has been carried as far as in the principal case. *Hannan* v. *Seidentopf* (1901) 113 Iowa 658. The better doctrine, however, is that where the purchaser had knowledge of the previous relations of the parties, and no ostensible change in possession has since occurred, he will not be taxed with notice. *Schumacher* v. *Truman* (1901) 134 Cal. 430. While the principal case thus fails on the theory advanced by the court, if the deed be considered as a formal abandonment of an easement, of which notice was not necessary, it follows that the plaintiff never obtained the easements. *White* v. *Manhattan Ry. Co.* (1893) 139 N. Y. 19.

REAL PROPERTY—PERCOLATING WATERS. The plaintiffs dug wells on their land from which they procured a supply of water for irrigation and domestic use. The defendant, an adjoining owner, sank wells and shut off the plaintiff's supply, using the water on distant tracts. *Held*, the plaintiff should have relief, as the common-law doctrine of absolute ownership of percolating waters is not adopted in California. *Katz* v. *Walkinshaw* (Cal. 1903) 74 Pac. 766.

This opinion on rehearing affirms the view in the original decision reported in 70 Pac. 663. Reviewing earlier cases in the state, the court concluded that the question of correlative rights in percolating waters was still an open one in that jurisdiction, and that the general rule did not apply to California owing to the peculiar climatic conditions and the arid character of the soil rendering water a valuable commodity similar to gas or oil elsewhere. See 1 COLUMBIA LAW REVIEW, 120, 133, 505; 3 id. 425, 593; 4 id. 143, 233.

REAL PROPERTY—RESTRICTIVE COVENANT—CHANGE IN NEIGHBORHOOD AS DEFENSE TO INJUNCTION SUIT. Through the plaintiff's grantees, the defendant acquired title to land subject to a covenant restricting its use to residence purposes. In a suit to enjoin a violation of the covenant, the defendant set up a change in the character of the neighborhood. *Held*, the covenant was for the plaintiff's personal benefit and not a part of a building scheme, and therefore the defence was invalid. *Osborne* v. *Bradley* [1904] 2 Ch. 446.

The inference from the decision is that a change in the character of the neighborhood would per se be a defence if the covenant formed part of a building scheme. But, though sound on principle, this distinction seems unnecessary, since in England in similar cases there must be in addition to a change of neighborhood an acquiescence therein by the plaintiff, *Sayers* v. *Collyer* (1884) 54 L. J., Ch. 1, or conduct on his part causing the change. *Bedford* v. *Trustees* (1822) 2 Myl. & K. 552. In American jurisdictions a change of neighborhood so extensive as to make the covenant no longer applicable will, it seems, be a defence per se to an action to restrain the breach of an impersonal covenant. *Trustees* v. *Thacher* (1882) 87 N. Y. 311; *Rolt* v. *Jung* (N. Y. 1903) 79 App. Div. 1; 4 COLUMBIA LAW REVIEW, 73.

REAL PROPERTY—RIGHTS OF ABUTTING OWNER IN SHADE TREES. An abutting owner sued the defendant for destroying ornamental shade trees standing in front of his premises, but on land not owned by him. *Held*, the plaintiff had a property right in the trees sufficient to enable him to maintain an action against a person through whose negligence the trees were destroyed. *Donahue* v. *Gas Co.* (1904) 85 N. Y. Supp. 478.

The court reasons "that an abutting owner whose property is injured * * * is entitled to recover the damages sustained." But this assumes the question. It is difficult to see how the plaintiff becomes vested with

a property right in the trees. The court intimates that such right is merely an extension of the doctrine of the Elevated Railroad cases vesting in an abutting owner an easement of light, air and access. Conceding, however, that the same principle governs, the granting of this easement in ornamental shade trees seems to extend it unnecessarily into the field of so-called æsthetic easements. The court is supported in its decision by the case of *Lane* v. *Lamke* (N. Y. 1900) 53 App. Div. 395. See 2 Dillon, Municipal Corporations, 4th Ed., § 664, a.

TAXATION—EXEMPTION—INTERPRETATION. The charter of a bank granted it exemption from any tax on its "capital." The legislature subsequently passed an act imposing a tax upon all banks, the size of the tax varying with the amount of the capital of a bank. *Held*, the bank was not liable as the tax imposed was within the exemption. *Citizens' Bank of La.* v. *Parker* (1904) 192 U. S. 73. See NOTES, p. 292.

TORTS—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE. In an action for personal injuries caused by machinery left unfenced in violation of a statute, the jury was instructed that the plaintiff could recover unless the danger was so imminent that a reasonably prudent person would not have continued at work exposed to it. *Held*, to confuse contributory negligence and assumption of risk and to be reversible error. *St. Louis Cordage Co.* v. *Miller* (C. C. A., 8th Circ. 1903) 126 Fed. 495.

Assumption of risk rests in consent and is akin to waiver, Bishop on Non-Contract Law § 675; contributory negligence does not depend on volition. Assumption of risk relieves the defendant of a duty; contributory negligence predicates a duty in the defendant, but introduces an adequate intervening cause of the injury. *Thomas* v. *Quartermaine* (1887) 18 Q. B. D. 685. Assuming a risk is not per se negligence, *Pennsylvania Co.* v. *Long* (1883) 94 Ind. 250, and there may be assumption of risk without contributory negligence. The decision is correct, though the court's attempt to make assumption of risk a part of the contract of service seems weak and an unnecessary limitation on the doctrine. *Thomas* v. *Quartermaine*, supra. See 1 COLUMBIA LAW REVIEW 61, 132, 494; 2 id. 187, 563; 3 id. 344.

TORTS—MASTER AND SERVANTS—TEST OF FELLOW SERVICE. The plaintiff's intestate, a section hand in the defendant's employ, lived in the defendant's section house, near its track. After working hours he left the house and while crossing the track for purposes of his own was caught between two cars and killed. *Held*, the operatives in charge of the train were fellow-servants of the deceased and the plaintiff could not recover. *Dishon* v. *C., N. O. & T. P. R. Co.* (C. C., E. D. Ky., 1903) 126 Fed. 194.

The court makes the existence of fellow-service depend upon whether the servant, when killed, "was doing something which it was his duty or he had a right to do under the contract," and finds as a fact that his contract required him to live in the section house in order to be within call and gave him the right to cross the tracks. If the facts will bear this interpretation, which seems open to doubt, the case is soundly decided under the above rule. Substantially the same test was laid down in 3 COLUMBIA LAW REVIEW 49, where *Orman* v. *Salvo* (1902) 117 Fed. 233, which the present case refuses to follow, was adversely criticised.